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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 MONEY MAILER, LLC,

10 Plaintiff,

11 v.

12 WADE G. BREWER,

13 Defendant.

14 WADE G. BREWER,

15 Counterclaim Plaintiff,

16 v.

17 MONEY MAILER, LLC, *et al.*,

18 Counterclaim Defendants.

NO. C15-1215RSL

ORDER CERTIFYING QUESTIONS  
TO THE STATE SUPREME COURT

19 On June 28, 2018, the Court found that Money Mailer Franchise Corporation and Money  
20 Mailer, LLC (hereinafter, "Money Mailer") had marked up the charges it assessed against its  
21 franchisee, Wade G. Brewer, for printing services by over 100% without adequately disclosing  
22 the mark up. Money Mailer failed to provide evidence giving rise to a genuine issue of fact  
23 regarding either the price at which it obtained printing services or the price it charged Brewer for  
24 those services. Its argument that "printing services," when charged to Brewer, included a number  
25 of other types of goods/services and meant something other than what "printing services" meant  
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1 when Money Mailer paid for those services was rejected on both the facts and the law.

2 Money Mailer timely filed a motion for reconsideration, arguing that (1) the Court had  
3 failed to consider its evidence regarding the reasonableness of the printing prices charged to  
4 Brewer in the light most favorable to Money Mailer, (2) the Court committed manifest error  
5 when it held as a matter of law that a 100% markup on the cost of printing services was  
6 unreasonable and a violation of the Franchise Investment Protection Act (“FIPA”), and (3) new  
7 evidence has come to light showing that Brewer would likely be unable to obtain printing  
8 services on the open market for less than what Money Mailer was charging him. It also requests  
9 permission to take an interlocutory appeal of the Court’s determination that a franchisor’s two-  
10 fold markup on the costs of services charged to a franchisee violates FIPA as a matter of law.

11 Underlying all of Money Mailer’s arguments is its contention that its charges for printing  
12 services were fair and reasonable because they approximate what other franchisors in the  
13 industry charge and/or what Brewer would have had to pay if he had individually contracted for  
14 the services from a third-party vendor. Money Mailer misses the point. In the circumstances  
15 presented here, the relevant inquiry is not what other franchisors are charging for similar  
16 services (other franchisors may similarly be overcharging franchisees) or even what an  
17 individual franchisee could negotiate on the open market. Money Mailer had done its own  
18 calculations regarding the costs of printing when it performed those tasks in-house and was  
19 subsequently able to purchase printing services for even less from a third-party vendor. Absent  
20 some evidence of a special discount or other indication that the price Money Market paid was  
21 not a market price, the fair and reasonable costs of the services were established by what Money  
22 Mailer was actually paying for the printing services. The undisputed evidence showed that  
23 Money Mailer was paying X for “printing services” and was charging approximately 2X to  
24 Brewer for “printing services.” The Court declines to reconsider its factual conclusion that  
25 Money Mailer had marked up its costs by approximately 100% or its legal conclusion that

1 selling a specified service to a franchisee at more than twice what those services cost the  
2 franchisor violates FIPA's prohibition on selling "to a franchisee any product or service for more  
3 than a fair and reasonable price." RCW 19.100.180(2)(d).

4 To the extent Money Mailer's motion is based on its insistence that the phrase "printing  
5 services" when included on an invoice to the franchisee includes "many value-added services  
6 offered by [Money Mailer] beyond merely printing ink on paper" (Dkt. # 180 at 9), the Court  
7 again rejects that argument as unreasonable. Money Mailer is both the purchaser and seller of the  
8 services. It paid a certain amount for a set of services it designated as "printing services" and  
9 charged Brewer two times as much for what were described as "printing services." Its argument  
10 is either that it used the same term for two different things or that it failed to disclose the services  
11 Brewer was required to purchase from the franchisor by subsuming them under the label  
12 "printing services." The first argument is not supported or reasonable, and the second would  
13 likely also violate FIPA.

14 The Court appropriately considered the evidence in the record. Money Mailer's motion  
15 for reconsideration is DENIED.

16 With regards to the motion for certification of an interlocutory appeal, Money Mailer has  
17 not shown exceptional circumstances that would justify piecemeal consideration of these issues  
18 by the Ninth Circuit. The Court finds, however, that certification of the state law issues to the  
19 Washington Supreme Court is warranted in the circumstances presented here. Pursuant to RCW  
20 2.60.020, "[w]hen in the opinion of any federal court before whom a proceeding is pending, it is  
21 necessary to ascertain the local law of this state in order to dispose of such proceeding and the  
22 local law has not been clearly determined, such federal court may certify to the supreme court  
23 for answer the question of local law involved and the supreme court shall render its opinion in  
24 answer thereto." The certification process generally serves the important judicial interests of  
25 efficiency and comity, and the Court recognizes that there is a presumption against certification  
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1 to the state Supreme Court when the federal court has already resolved an issue on summary  
2 judgment. Thompson v. Paul, 547 F.3d 1055, 1065 (9th Cir. 2008); Hinojos v. Kohl's Corp., 718  
3 F.3d 1098, 1108-09 (9th Cir. 2013). Despite the expenditure of time and resources the  
4 undersigned has already made in evaluating and deciding Brewer's motion for summary  
5 judgment, the Court finds that "cooperative judicial federalism" would be enhanced by  
6 certification. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

7 As the memoranda of the parties makes clear, Washington law differs from many states in  
8 the level of protection it provides to franchisees. Being cognizant of that fact, the Court made  
9 two findings which were not compelled by existing case law. First, the Court impliedly found  
10 that a franchisee may generally rely on the price at which a franchisor purchased a particular  
11 good or service to show what the "fair and reasonable price" for that service is. Second, the  
12 Court found that selling a franchisee a particular good or service for twice what it cost the  
13 franchisor is not a "fair and reasonable price" and violates FIPA as a matter of Washington law.  
14 The Court used its best judgment to predict how the state's highest court would rule given the  
15 particular facts of this case (U.S. v. Bibbins, 637 F.3d 1087, 1094-95 (9th Cir. 2001)), but the  
16 input of the Supreme Court will ensure that this case proceeds to judgment (and through any  
17 appeal) on a firm legal footing. Despite the fact that the Court has already expended "time,  
18 energy and resources" considering these issues, comity suggests that this matter should be  
19 presented for expedited review pursuant to RCW 2.60.020.

20 For all of the foregoing reasons, the following questions are hereby certified to the  
21 Supreme Court of Washington:

22 For purposes of FIPA's prohibition on selling "to a franchisee any product or  
23 service for more than a fair and reasonable price" (RCW 19.100.180(2)(d)), may  
24 the franchisee rely on the price at which the franchisor is able to obtain the product  
25 or service in the absence of evidence indicating that the price was not a true market  
price?

26 Does a franchisor violate RCW 19.100.180(2)(d) as a matter of law when it

1 charges the franchisee twice what it pays for a product or service?

2 The Clerk of Court is directed to submit to the Supreme Court of Washington certified copies of  
3 this Order, a copy of the docket in the above-captioned matter, and Dkt. # 9, 12, 139, 105-06,  
4 109-12, 147, 123, 148, 125-26, 131-32, 177, 180-82, 186, and 193.<sup>1</sup> The record so compiled  
5 contains all matters in the pending cause deemed material for consideration of the state law  
6 questions certified for answer.

7 Money Mailer is designated as the appellant before the Supreme Court of Washington.  
8 The Clerk of Court shall notify the parties as soon as possible, but no more than three days, after  
9 the above-described record is filed in the Supreme Court of Washington. The parties are referred  
10 to state RAP 16.16 for additional information regarding procedure before the Supreme Court.  
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25 <sup>1</sup> Some of these documents have been filed under seal in the Western District of Washington  
26 with the permission of the undersigned.

1 For all of the foregoing reasons, Money Mailer's request for reconsideration or  
2 certification for interlocutory appeal to the Ninth Circuit (Dkt. # 180) is DENIED. This matter is  
3 hereby certified to the Supreme Court of the State of Washington for consideration of the local  
4 law issues set forth above. The federal action is STAYED pending resolution of the certified  
5 issues. The Clerk of Court is directed to enter a statistical termination in this case. Such  
6 termination is entered solely for the purpose of removing this case from the Court's active  
7 calendar. The parties shall, within fourteen days of the Washington Supreme Court's resolution  
8 of the certified issues submit a Joint Status Report setting forth the parties' recommendations for  
9 a new trial date, other scheduling deadlines, and consideration of pending motions (Dkt. # 163,  
10 179, 187, 190, 194, 198, 205, 215, and 218).

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12 Dated this 7th day of September, 2018.

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14 Robert S. Lasnik  
15 United States District Judge  
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